88-2041

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF:
The Complaint of EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,
Petitioner,

v.

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. §1333 and Article III, Section 2, of the Constitution.

2. Whether the Limitation of Liability Act 46 U.S.C. §181 *et seq.* provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. §1333.

3. Whether the Extension of Admiralty Act 46 U.S.C. §740 provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. §1333.

LIST OF PARTIES

The parties to the proceedings below were Everett A. Sisson, as owner of the motor yacht the ULTORIAN and the respondents Burton B. Ruby, Fireman's Fund Insurance Company and Port Authority of Michigan City as claimants in the limitation proceeding.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner Everett A. Sisson respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on January 24, 1989 and March 16, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 867 F.2d 341 (7th Cir. 1989), and is reprinted in the appendix hereto, at 1a, *infra*. The order of the Court of Appeals for the Seventh Circuit denying petitioners petition for rehearing is reprinted in the appendix hereto at 22a, *infra*. The order of the United States District Court for the Northern District of Illinois is reported at 663 F.Supp. 858 (N.D. Ill 1987), and the order denying the motion for reconsideration is reported at 668 F.Supp. 1196 and are reprinted in the appendix hereto at 24a and 36a *infra*, respectively.

JURISDICTION

The petitioner invoked federal jurisdiction under 28 U.S.C. §1333 in the United States District Court for the Northern District of Illinois Eastern Division. The petitioner also based jurisdiction on the Limitation of Liability Act 46 U.S.C. §181 *et seq*. On July 1, 1987 the district court dismissed petitioner's complaint for lack of subject matter jurisdiction which dismissal was affirmed on rehearing on September 25, 1987.

On petitioner's appeal, the Seventh Circuit affirmed the district court on January 24, 1989 finding that there was no subject matter jurisdiction. On March 16, 1989, the Seventh Circuit Court of Appeals denied a petition for rehearing with suggestion for rehearing en banc. The petitioners seek review of the decisions of the Seventh Circuit.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Article III, Section 2, Of The Constitution

The judicial power shall extend to all cases . . . of admiralty and maritime jurisdiction. . . .

28 U.S.C. §1333. ADMIRALTY, MARITIME and prize cases

The district court shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or Maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. §181 *et seq*. LIMITATION OF LIABILITY

See Appendix at 42a.

46 U.S.C. §740. EXTENSION OF ADMIRALTY JURISDICTION ACT

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage

has been done and consummated on navigable water; Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

STATEMENT OF THE CASE

Everett Sisson was the owner of a 56′ yacht known as the M/V ULTORIAN which he docked at Washington Park Marina in Michigan City, Indiana. On September 24, 1985, a fire erupted on board the yacht destroying the vessel and causing damage to the marina and several neighboring boats. It is believed that the fire was caused by a defective washer/dryer unit on board the yacht, the negligent installation of the unit and/or the defective construction of the ventilation system for the washer/dryer unit.

As a result of the fire, claimants asserted claims against Everett Sisson for amounts in excess of $275,000. The value of the ULTORIAN before she was totally destroyed was approximately $600,000.

REASONS FOR GRANTING THE WRIT

It is the contention of the appellant Everett Sisson that the district court had admiralty subject matter jurisdiction because; first, the fire which destroyed the Sisson Yacht and caused damage to the claimants' property was related to a traditional maritime activity; second, because the Limitation of Liability Act 46 U.S.C. §183 *et seq.* provided a separate basis of Admiralty Jurisdiction Act; and, third, because the Extension of Admiralty Jurisdiction Act also provided a separate basis for jurisdiction. The nexus test derived from the *Executive Jet/Foremost* cases provides that the loss must arise from a traditional maritime activity. Here, Mr. Sisson's boat was docked at a marina, and docking is a traditional maritime activity. The fire on a boat engaged in a traditional maritime activity is a hazard which is well known in the maritime world. Other boats and a marina were damaged as a result of the fire. Also, the fire posed a threat to commerce and navigation. Alternatively, the Limitation of Liability Act, 46 U.S.C. §183 *et seq.* or the Extension of Admiralty Jurisdiction Act 46 U.S.C. §740 provides a separate basis for jurisdiction here because all of the requirements of the Acts were met by Mr. Sisson.

The interpretation and application of this Court's decision in *Foremost Insurance Co. v. Richardson*, 457 U.S. 660 (1982) by the 7th Circuit are much too restrictive and also in conflict with the decisions of other circuits (Rule 17.1(a)) and, arguably, with the Constitution.

A. Traditional Maritime Activities Are Not Limited To Situations Involving Commercial Activity And Navigation.

The Seventh Circuit's decision involved the interpretation of the decision of the United States Supreme Court in *Foremost Insurance Co. v. Richardson* 457 U.S. 668 (1982). In its interpretation of the *Foremost* case, the court developed its own test to determine when the district courts had admiralty jurisdiction in tort cases. The court determined that admiralty jurisdiction would be available in "cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially 'disruptive impact' on maritime commerce and (2) involves the 'traditional maritime activity' of navigation." Decision at page 8a. Because this case involved a non-commercial activity, the court determined that the two step analysis for non-commercial activities was necessary to determine jurisdiction.

The court admittedly applied a narrow reading of the phrase "traditional maritime activity" which was the guidepost established by the *Foremost* Court. It limited such activity to cases involving navigation. Decision at page 9a. The court justified this narrow reading by certain language found in the *Foremost* decision. Alternatively, the court noted that even if "traditional maritime activity" was not confined to cases involving navigation, the court determined that the sort of fire on board the Sisson yacht should not be considered a "traditional concern" of maritime law.

The petitioner believes that the test developed by the Seventh Circuit was excessively restrictive and does not reflect the intent of the *Foremost* case in deciding jurisdiction on the basis of the presence of traditional maritime

activities. The two pronged "test" does not represent a fair reading of *Foremost* for two reasons.[1]

First, the test developed by the court places an inordinate amount of emphasis on maritime commerce as a limiting factor to jurisdiction even in cases involving non-commercial activities. The Seventh Circuit had previously used commercial activity as the determining factor for maritime jurisdiction issues before the decision in *Foremost*. *Chapman v. U.S.*, 575 F.2d 147, 1978 A.M.C. 2202 (7th Cir. 1978). This emphasis on maritime commerce was specifically repudiated in *Foremost* and cannot be the primary basis for any test to determine maritime jurisdiction. The court's decision, in effect, will move the law of Admiralty jurisdiction backwards to the days of defining maritime jurisdiction in the pre-*Executive Jet/Foremost* era.

Second, it is clear that the negligent navigation of a pleasure craft on navigable waterways is only one of many actions which have a significant connection with a traditional maritime activity; but it is not the sole, exclusive

---

[1] Even the concurring opinion recognized that the narrow reading of *Foremost* would place "inappropriate restrictions on admiralty jurisdiction in other instances". As noted by the opinion:

> "However, I do not read the Supreme Court's opinion as necessarily precluding jurisdiction based on other hazards traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce.
>
> Hopefully, before long, the Supreme Court will revisit this quagmire and resolve the current ambiguity generated by the courts of appeals in the wake of *Foremost*.

There was the recognition that other hazards are associated with maritime activities and these included fire. Still, the concurring opinion focused on "maritime commerce" as the primary basis for admiralty jurisdiction.

wrong. The test is whether the wrong has a significant connection with traditional maritime activity and not whether the wrong only involves the negligent operation of a vessel.

In the instant case, THE ULTORIAN was docked at a marina on a navigable waterway, Lake Michigan, at the time of the fire. There can be no question that the mooring or docking of a vessel at a marina, or other dock facility, is a traditional maritime activity. Docks (marinas) serve the various needs of vessels and have done so for centuries. During the course of a sailing season, yachts, such as THE ULTORIAN, are customarily moored or docked at marina facilities when they are not actually in use. Typically, a contract between the vessel owner and the marina owner governs the docking or mooring and the contracts themselves are subject to admiralty jurisdiction. *American Eastern Development Corporation v. Everglades Marina, Inc.*, 608 F.2d 123, 1980 A.M.C. 2011, 2012 (5th Cir. 1979); *English Whipple Sail Yard Ltd. v. The Yawl Art*, 459 F.Supp. 866, 1980 A.M.C. 1104 (W.D. Pa. 1978). Also, as vessels are not always moving, from time to time they need to be moored or docked for repair, rest, convenience or any number of reasons related to the vessels' operation. This does not mean that they have been withdrawn from maritime activity. They are simply in a floating position from which they can be quickly started and taken out to sea. Mooring and docking as traditional maritime activities are clearly evident in the multitude of admiralty cases which involve such activities. Some recent examples of these are found in *Weyerhauser Company v. Vessels ATROPAS, et al.*, 777 F.2d 1344 (9th Cir. 1985); *National Marine Service, Inc. v. Petroleum Service Corp.*, 736 F.2d 272 (5th Cir. 1984); *Hardesty v. Larchmont Yacht*, 1983 A.M.C. 1059 (S.D.N.Y. 1982).

Relying on navigation as the defining element also creates definitional problems, as the panel recognized. Page 13a n. 7. This restricted view will not limit jurisdictional issues but will only cause future confusion and destroy the uniform application of maritime law. However, even if navigation is the only traditional maritime activity which could trigger the maritime jurisdiction of this Court, the ULTORIAN was in navigation at the time of the fire. To find otherwise would be a restricted and unwarranted interpretation of the meaning of "navigation" as demonstrated by the Fifth Circuit Court of Appeals in *American Eastern, supra.*

American Eastern involved two pleasure craft which had been damaged in a fire at a marina. The boats were fully operational and were lifted in and out of the water on a weekly basis by a forklift. The court noted that the purpose of the storage was to obviate storage in salt water with the attendant cost of maintenance (including keeping the boats barnacle free). With regard to the issue of whether a claim against the marina could be plead in admiralty, the Fifth Circuit stated as follows:

> The boats were not withdrawn from navigation. This case is more analogous to those involving docking or wharfage than to those where boats are stored for the winter or laid up for long periods. In recent years, many pleasure boaters who frequently take their boats in and out of the water, as appellees here did, have come to regard dry storage at waterside marinas, from which the boats may be readily taken in and out, as an alternative to tying their boats up at docks or moorings. The boat is readily accessible to the water and can be quickly and easily launched or brought ashore to the storage shed but it is not exposed to deteriorating effects of water or weather. Moreover, in determining whether a vessel has been withdrawn from navigation, one must look at its pat-

> tern of use. Pleasure boats are often tied up a higher proportion of the time than commercial vessels which typically may spend little time in port. Here, the boats in question were used no less than necessary or appropriate for pleasure craft, and the dry storage, incident to regular use, was a substitute for wet mooring or docking. Admiralty jurisdiction has, in the past, changed as "new conditions give new rise to new conceptions and maritime concerns." (Citations omitted.)

608 F.2d at 124-25.

The Fifth Circuit therefore concluded that the fact that the boats were taken in and out of the water almost on a weekly basis did not mean that they were withdrawn from navigation and thus, the claims fell within the admiralty jurisdiction of the Court. *Id.* at 125.[2]

Clearly the facts in this case are even stronger than in *American Eastern*, because THE ULTORIAN was not beached or lifted in and out of the water on a regular basis but was moored in a navigable waterway at a dock in a marina. It was not withdrawn from navigation and was thus involved in a traditional maritime activity at the time of the fire. The fire also caused damage to the marina's dock and other vessels all of which were engaged in a traditional maritime activity.

The decision does not define commercial activity. Is not the operation of a marina a commercial activity? Boats pay rent, buy fuel and provisions, obtain insurance, pay salaries, repair boats, and pay taxes. These goods and services move, as do the boats themselves, in interstate commerce. The test suggested just does not work.

[2] Ironically, the *Foremost* case also originated in the Fifth Circuit and this Court affirmed the decision of the Court of Appeals regarding the correct interpretation of the standard needed to support admiralty jurisdiction.

The Seventh Circuit's opinion also ignores the universal recognition of fire as a classic marine peril. Indeed, according to the Fifth Circuit in a case involving a fire aboard a docked freighter,

> A non-friendly fire [as opposed to a galley stove fire] aboard ship so long as it remains unextinguished is a classic case of marine peril. With flammable materials almost everywhere, passages and spaces where natural convection readily permits a small smoldering to break out in a blazing fury, the history of the sea attests to fire as a cause of some of the most catastrophic of marine disasters. See, the *Morro Castle* and *Texas City Disasters.*

Legnos v. M/V OLGA JACOB, 498 F.2d 666, 670 (5th Cir. 1974), citing *Morro Castle* Disaster: *United States v. Abbott*, 89 F.2d 166 (2d Cir. 1937); *Hyman v. Pottsberg's Ex'rs.*, 101 F.2d 262 (2d Cir. 1939); *Petition of Agwi Navigation and New York & Cuba Mail S.S.*, 1939 A.M.C. 895 (S.D.N.Y. 1939); *New York & Cuba Mail S.S. Co. v. Continental Insurance Company*, 32 F.Supp. 251 (S.D. N.Y. 1940) (fire abroad passenger vessel cause death of over one hundred persons); *Texas City* Disaster: *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir., 1952), *aff'd sub nom., Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (approximately 560 persons killed and much of Texas City destroyed by fires and explosions originating from cargoes of fertilizer on two vessels in Texas City Harbor); *Republic of France v. United States*, 290 F.2d 395 (5th Cir. 1961).

A rule which would distinguish between fires according to whether the vessel is docked or physically "in navigation" when the fire arises, or between whether the source of igni-

tion is maritime or non-maritime, would destroy the uniformity which is the object of the admiralty jurisdiction and ignores the marine perils shared by pleasure and commercial vessels.

The uniform objective of the admiralty jurisdiction is an important concept and has its roots in Article III section 2 of the Constitution in which the federal judiciary was given admiralty and maritime jurisdiction. This has been interpreted by this Court to encompass three different grants of power:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, §8, cl.9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," [citation omitted], and to continue the development of this law within Constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the Constitution.

Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61, *rehearing denied* 359 U.S. 962 (1959).

It is important to maintain the uniformity of admiralty law in order to conform to the Constitutional protection afforded it. The only way this uniformity can be maintained is through the federal judiciary which has historically interpreted and applied federal maritime law and sought to preserve the uniformity. The Seventh Circuit's decision threatens that uniformity by removing from Federal jurisdiction, a whole class of cases based on an unjustifiably narrow reading of this Court's opinions.

B. The Seventh Circuit's Decision Is In Conflict With Other Circuits.

The test developed by the Seventh Circuit is also in sharp contrast with the law in other circuits which generally follow the 5th Circuit test. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied* 416 U.S. 969 (1974); *Drake v. Raymark Industry*, 772 F.2d 1007, 1986 A.M.C. 1965 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1974 (1986); *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 1985 A.M.C. 2317 (4th Cir.) (en banc), *cert. denied*, 106 S.Ct. 351 (1985); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 1986 A.M.C. 731 (11th Cir. 1984); *Edynak v. Atlantic Shipping Inc.*, 562 F.2d 215, 1977 A.M.C. 2477 (3d Cir. 1977); *T.J. Falgout Boats, Inc. v. U.S.*, 508 F.2d 855 (9th Cir. 1974); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 (1974).

Most recently, the Court of Appeals for the Sixth Circuit even criticized the Seventh Circuit's "indefensibly narrow reading of *Foremost Insurance*." *In re John Young*, 872 F.2d 176 (6th Cir. 1989).

Petitioner recognizes that there are problems with the *Kelly* test factors which do not render an easy solution in all cases. The Fifth Circuit has, for example, recently seemingly added additional criteria to consider in making such decision. *Molett v. Penrod Drilling Co.*, 826 F.2d 1419 (5th Cir. 1987). Yet, all other tests clearly show that flexibility is called for beyond that mandated by the Seventh Circuit's reliance on the element of commerce.

As an example of the flexibility, the four-part test of *Kelley* would confer admiralty jurisdiction here. The petitioner was a boat owner and the claimant-appellees were boat owners at a marina. The vehicles involved were vessels and a vessel dock. The type of injury was the

destruction of vessels at a dock. Docking and mooring are traditional maritime activities. Applying the two-part test of *Smith v. Knowles* 642 F.Supp. 1137 (D.Md. 1986), would also result in jurisdiction. Then you would have the traditional activities of mooring and docking as well as the installation of the washer/dryer in a boat, which boat is distinctly maritime in nature. The second part of the test was also satisfied here because the fire which resulted from the yacht spread to other boats in other docks causing damage that could clearly have hindered the navigation of any other vessels within the harbor. The fire could have spread throughout the marina and into a nearby channel which would then have hindered navigation of commercial vessels.

Petitioner takes the position that the decision in *Foremost* precluded any test which relies on the commercial activity or which limits traditional maritime activities to just navigation. In either situation, admiralty jurisdiction would be inappropriately restricted. While other tests have been utilized to determine what constitutes traditional maritime activities, any determination must be expansive and not restrictive as to do otherwise would destroy traditional notions of admiralty jurisdiction.

C. The Limitation Of Liability Act Provides A Separate Basis Of Admiralty Jurisdiction.

If this Court were to find that there is admiralty jurisdiction, it will be unnecessary to proceed to an analysis of the separate jurisdictional basis provided by the Limitation of Liability Act. However, should this Court agree with the Seventh Circuit's analysis and decision on this point, plaintiff-appellant believes that the Act provides a separate basis for jurisdiction.

The Seventh Circuit determined that a nexus requirement was essential to the applicability of maritime jurisdiction pursuant to the Limitation of Liability Act. However, the conclusion is inescapable that, because the right to limitation under section 189 does not depend on the maritime nature of the liability, jurisdiction under the Limitation Act is not co-extensive with admiralty jurisdiction in tort. According to the interpretation of section 189 in *Richardson v. Harmon*, 220 U.S. 96 (1911) a federal court's admiralty jurisdiction in tort and its admiralty jurisdiction under the Act are necessarily two separate species of admiralty jurisdiction, the latter extending jurisdiction to any and all liabilities arising out of the conduct of the vessel.

The decisions in *Executive Jet* and *Foremost* did not change the meaning placed upon section 189 of the Act as decided by the court in *Richardson*. *Richardson* expressly held that the Limitation Act was intended by Congress to apply to torts even where there was no admiralty jurisdiction in tort. 222 U.S. at 106. *Richardson* did not hold that section 189 of the Act effectively expanded admiralty jurisdiction in tort to cover injuries which originated on navigable waters but were consummated on land. Rather, the *Richardson* court construed an act of Congress as conferring a separate source of admiralty jurisdiction which defendant shipowners might invoke irrespective of the maritime nature of the liability sought to be limited.

Even *Executive Jet* was limited to situations "in the absence of legislation to the contrary". 409 U.S. 274 (citing the Death On The High Seas Act, 46 U.S.C. §761-768). The enactment of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740 also did not change the meaning of

Richardson. The legislative purpose of Congress's enactment of §740 was to overrule the Supreme Court's decision in *Martin v. West*, 222 U.S. 191 (1911) and extend admiralty jurisdiction in tort to such cases. To say that §740 "codified" *Richardson* is to miss the point of both *Richardson* and 46 U.S.C. §740. If *Richardson* and §740 have equal meaning then §740 was unnecessary and this Court handed down contradictory decisions in the same year.

It is urged that this Court reconsider the analysis of the Limitation of Liability Act. The Act provided a separate basis of jurisdiction which should not be compromised or limited in any fashion.

D. The Extension Of Admiralty Jurisdiction Act, 46 U.S.C. §740 Also Provides A Basis For Admiralty Jurisdiction.

The Admiralty Extension Act extends Admiralty jurisdiction to "all cases of damage" to property "caused by a vessel on navigable water" and even if the damage is "consummated on land."

Here, we had damage caused by a vessel on navigable waters. *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 (1974). The dock involved was an extension of land and covered by the Act. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 83 S.Ct. 1185, *rehearing denied*, 374 U.S. 858, 83 S.Ct. 1863 (1963). The dock was damaged as were other boats moored to the dock. The Act clearly confers jurisdiction.

CONCLUSION

It is respectfully requested that this Court grant the petition for a writ of certiorari for the above stated reasons.

Respectfully submitted,

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APPENDICES

APPENDIX 1

[837 F.2d 341 (7th Cir. 1989)]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 87-2713 and 87-2736

IN THE MATTER OF:
The Complaint of EVERETT A. SISSON, as owner of the motor yacht, The Ultorian, for exoneration from or limitation of liability,

Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 1991—**Nicholas J. Bua**, *Judge*.

ARGUED MAY 23, 1988—DECIDED JANUARY 24, 1989

Before CUDAHY, RIPPLE and KANNE, *Circuit Judges*.

CUDAHY, *Circuit Judge*. This case presents an intriguing classificatory problem concerning the scope of the federal courts' admiralty jurisdiction. Specifically, we must decide whether a fire aboard a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity.

Everett Sisson owned the Ultorian, a 56-foot pleasure yacht, docked at the Washington Park Marina on Lake Michigan in Michigan City, Indiana. A fire erupted on the vessel, destroying it completely and damaging extensively the marina and several other boats. The fire allegedly

was caused by a defective washer and dryer. The net value of the Ultorian after the fire was $800. The owners of the other vessels and of the marina have made claims for damages in excess of $275,000.

Sisson sought injunctive and declaratory relief in the district court, asserting jurisdiction under 28 U.S.C. § 1333, which provides in part:

> The district court shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Essentially Sisson wishes to limit his liability to the claimants for damages caused by the fire, pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.* The district court dismissed Sisson's complaint for lack of subject-matter jurisdiction.

Sisson moved for reconsideration, alleging that the Limitation of Liability Act provides a separate source of admiralty jurisdiction in this case. The district court denied the motion because, in its view, Sisson introduced a new legal theory which could have, but had not, been raised in the original opposition to dismissal. The court then rejected Sisson's argument on the merits, concluding that the Limitation of Liability Act does not provide an independent basis of federal admiralty jurisdiction. The court held alternatively that, even if subject-matter jurisdiction did exist, Sisson was not entitled to limit his liability for damage caused by a pleasure boat.

For the reasons given below, we affirm the district court's dismissal of the case for lack of subject-matter jurisdiction.

I.

Had this case arisen prior to 1972, it would have fallen within the admiralty jurisdiction. Throughout most of the history of admiralty law in this country, the key criterion distinguishing maritime torts has been whether the action-

able wrong occurred "on navigable waters." The Supreme Court stated the rule in *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866): "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." The present case would clearly have satisfied this "locality test;" it involves a fire that began on board a vessel moored on navigable waters, with resulting damage to other vessels also moored on navigable waters.

This test, however, was changed in 1972 by the Supreme Court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). In *Executive Jet* the owners of a jet aircraft invoked admiralty jurisdiction when their airplane crashed in Lake Erie. They alleged that the airport had negligently failed to keep its runway free of birds. The airplane's jet engines ingested the birds, causing the plane to lose power and crash. The tort arguably satisfied the locality test—the birds were ingested over, and the plane crashed in, the navigable waters of Lake Erie. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851). Reasoning that the locality test "was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a waterborne vessel," *id.* at 254, the Court concluded that locality by itself was an inadequate basis for assuming admiralty jurisdiction over an airplane crash. Writing for a unanimous Court, Justice Stewart held that in the context of aviation, "a significant relationship to traditional maritime activity" must be shown as well, before admiralty jurisdiction could be invoked in tort cases. *Id.* at 268. The Court's new "nexus" test was not satisfied by the mere similarity of problems confronting ships that sink and aircraft that crash in navigable waters. The fact that a "land-based plane flying from one point in the continental United States to another" happened to wind up in the water rather than on land did not provide a significant relationship between the crash and "traditional maritime activity involving navigation and commerce on navigable waters." *Id.* at 272.

Executive Jet left open the question whether the new "nexus" test would apply in non-aviation contexts. Any doubt about this issue was subsequently removed in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), a case involving the collision of two pleasure boats on navigable waters. The Court first concluded that all tort actions invoking admiralty jurisdiction must meet the new nexus test requiring a significant relationship with "traditional maritime activity." *Id.* at 673-74. When subsequently defining traditional maritime activity, the Court recognized that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," but refused to require that alleged tortfeasors be "actually *engaged* in commercial maritime activity" before they could assert admiralty jurisdiction. *Id.* at 674-75 (emphasis in original). In the Court's view, the federal interest in protecting maritime commerce "can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct." *Id.* at 675 (emphasis in original).

The Court held that although the boats involved were "pleasure" rather than "commercial" craft, the collision in *Foremost* fell within the federal courts' admiralty jurisdiction:

> The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

Id. (footnote omitted). The Court cautioned, however, that "[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction." *Id.* at 675 n.5. This seems to us a strong admonition to proceed with great caution in extending the *Foremost* principles.

We are now presented with a case that tests the limits of the developing admiralty nexus doctrine: Does a fire on board a moored pleasure yacht, docked in the navigable

waters of a recreational marina on Lake Michigan, bear a significant relationship to traditional maritime activity? Guidance from the Court on this question is limited to two cases: a collision on navigable waters between pleasure craft, that passes the test, and the crash of a land-based airplane in navigable waters, that fails the test.[1] *Foremost* makes it clear that the distinction between aviation and non-aviation contexts is not the critical issue. However, the existing case law gives little basis for determining under what circumstances an accident involving a vessel, in navigable waters, would lack the requisite nexus with "traditional maritime activity."

One principled approach to delimiting the scope of "traditional maritime activity" might be to look at the original reasons for asserting admiralty jurisdiction over that activity. Most scholars of admiralty law agree that the original purpose of admiralty courts was to establish a uniform body of laws to govern (and to promote) maritime commerce. *See, e.g.*, G. Gilmore & C. Black, *The Law of Admiralty*, §§ 1-1, 1-5 (1975); 7A J. Moore & A. Pelaez, *Moore's Federal Practice* ¶ .190, at 2005-06, ¶ .325[5], at 3606-07 (2d ed. 1988); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 280 (1950);

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[1] We are obviously at an early stage in the development of doctrine here. The definitional boundaries are being refined through the process of inclusion and exclusion in particular cases. *See* E. Levi, *An Introduction to Legal Reasoning* 8-27 (1949) (the "inherently dangerous" concept); Llewellyn, *On Warranty of Quality and Society I & II*, 36 Colum. L. Rev. 699 (1936), 37 Colum. L. Rev. 341 (1937) (the "warranty of quality" doctrine). In both the Levi and Llewellyn analyses, the defining characteristics of doctrinal categories developed, through uncomfortable ambiguity of the sort we face here, rather rapidly. They dealt with areas of tort and commercial law that were integrally involved in the burgeoning industrial and commercial progress of the time. By contrast, the admiralty doctrine involved in this case has had few opportunities for clarification through extension. Thus a detailed discussion of the possibilities left open by existing Supreme Court opinions in the area is required.

Stolz, *Pleasure Boating and Admiralty*: Erie *at Sea*, 51 Calif. L. Rev. 661, 667 (1963). However, in *Foremost* Justice Marshall rejected efforts to limit the admiralty jurisdiction to cases involving commercial shipping:

> [P]etitioners' argument that a substantial relationship with commercial maritime activity is necessary because commercial shipping is at the heart of the traditional maritime activity [that admiralty jurisdiction seeks to protect] . . . is premised on the faulty assumption that, absent this relationship with *commercial* activity, the need for uniform rules to govern conduct and liability disappears . . . .

Foremost, 457 U.S. at 674. Thus admiralty jurisdiction is not precluded in the case before us simply because the tort involves pleasure, rather than commercial, vessels.

Another approach would be to analyze the types of instrumentalities and accidents involved in each case in order to determine their relationship to traditional maritime activities. This is, in part, the direction taken by the district court opinion in this case, which paid close attention to the fact that the fire in question allegedly started in a possibly defective washer-dryer unit: "While it may be true that laundering is often performed on ships, the operation of a washer and dryer is not central to the operation of a vessel. . . . That rags used for vessel maintenance were being washed does not provide much of a maritime flavor." *Sisson v. Hatteras Yachts*, No. 87 C 0652, mem. op. at 5-6 (N.D. Ill. Oct. 13, 1987).

We believe that the precise source of a fire aboard a vessel should not carry great weight in determining whether the tort is "maritime." Accidents stemming from many diverse sources can have grave effects for "traditional maritime activity" when they occur at sea. If a fire threatened to disable a commercial vessel or to block the entrance to a major harbor, to exclude it from admiralty jurisdiction on the basis of its source would make little sense under the "nexus" test. Further, such an approach would seem productive of many instances in which it would

be necessary to try the case (to determine the source of the fire) to resolve the jurisdictional issue. It would also set the scene for endless hairsplitting definitional debates that do little to further the policy goals of this doctrine. Almost any conceivable accident when it occurs on board a ship can be categorized alternately as the result of a "traditional" activity necessarily performed by sailors through history (washing, preparing food, navigating the ship) or as the result of "modern" circumstances (an electric tooth brush malfunctions, or a microwave oven starts a fire). Analysis centered on how closely the source of an accident is related to "traditional maritime activity" thus seems an unproductive approach to the problem—at least in the context of accidents involving only vessels in navigable waters (as opposed to incidents involving objects on shore). There is little support in the language of the Supreme Court cases in this area for limiting admiralty jurisdiction to accidents that originated in a certain part of a vessel (i.e., the engine or steering mechanism), or that were caused by instrumentalities invented after a certain point in history.

However, the language used by the Court in *Foremost* does suggest some other limiting principles. Justice Marshall stressed repeatedly that a key function of admiralty jurisdiction is protecting "the smooth flow of maritime commerce" by ensuring uniform navigational rules, *id.* at 674-76, and by requiring that "all vessel operators are subject to the same duties and liabilities." *Id.* at 676. The references to "traditional maritime activity" in *Foremost* always rely upon discussions of "navigation" or the "*operation* of a vessel" to explain the concept. *Id.* at 674-76 (emphasis supplied). In a key passage, *Foremost* holds that in that case the collision between two pleasure boats on navigable waters fell under admiralty jurisdiction because of "[t]he potential disruptive impact of a collision between boats on navigable waters, *when coupled with* the traditional concern that admiralty law holds for navigation." *Id.* at 675 (emphasis supplied). Thus there is a reasonable basis for concluding that the *Foremost* Court intended to

limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation. In our view, a persuasive interpretation of *Foremost* would confine the admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation.[2]

Because the case before us involves only non-commercial activities, we must ask (1) whether the tort had a potentially "disruptive impact," and (2) whether it involved navigation.

In our view, a fire on board a moored vessel could disrupt commercial navigation. If, for example, the Ultorian had been moored at a large municipal dock rather than in a recreational marina (apparently exclusively for pleasure boats), the fire or smoke might easily have spread to commercial vessels. Further, the fire could have spread from the marina across oil-covered water to threaten or obstruct commercial traffic in the channel or elsewhere. However, as *Foremost* emphasized, "[n]ot every accident in navigable waters that might disrupt maritime commerce will support admiralty jurisdiction." *Id.* at 675 n.5. This caveat seems well-founded in light of the precedent established in *Executive Jet*. If potential disruptive impact upon commercial shipping were the primary criterion for determining whether a tort were related to traditional maritime activity, then the *Executive Jet* plane crash in navigable waters would have fallen within admiralty jurisdiction.

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[2] We do not here adopt the "four-factor" test used in several other circuits, *see, e.g., Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 639-41 (5th Cir. 1985); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1121 (9th Cir. 1984); *Harville v. Johns-Manville Corp.*, 731 F.2d 775, 783-87 (11th Cir. 1984), because we do not find it helpful in developing the kind of analysis indicated by *Executive Jet* and *Foremost*.

Thus we must proceed to analyze the second *Foremost* criterion for non-commercial maritime torts—the "traditional maritime activity" requirement.

Following the guidance given by careful scrutiny of the language in *Foremost*, we here apply a narrow reading of "traditional maritime activity," limiting application to cases involving navigation. Strong arguments, however, exist for broader treatment of this issue. Logically, fires aboard vessels—even when moored—are as much a traditional maritime concern as errors of navigation. Fire at sea, or at a mooring, is an ancient and dreaded hazard facing mariners. In *Richardson v. Harmon*, 222 U.S. 96 (1911), the Supreme Court—in commenting upon the exclusion from admiralty jurisdiction of torts involving vessels in which the resulting damage occurred on land—appeared to link collision and fire as twin maritime hazards:

> Prior to the [enactment of what is now section 189], it had been the settled law that the district court, sitting as a court of admiralty, had no jurisdiction to try an action for damages against a shipowner, arising from a fire on land, communicated by ship, or from a collision between the ship and a structure on land, such as a bridge or pier. The tort in both cases would have been a nonmaritime tort, and, as such, not within the cognizance of an admiralty court.

Id. at 101.

It is also somewhat puzzling to find the Court using a broad phrase such as "traditional maritime activity" in discussions that then proceed to deal only with navigation. The Court in *Foremost* may have been attempting to reconcile the relatively narrow policy basis for admiralty jurisdiction ("the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," *Foremost* at 674), with the broad application of the admiralty jurisdiction since its inception to all varieties of torts occurring on navigable waters—and particularly to collisions of vessels on navigable waters, the paradigmatic admiralty case. *See id.* at 672. Once the Court decided

to include pleasure boats, thus determining that "maritime commerce" is not the only "traditional maritime activity," it appears to have looked to the traditional concern of admiralty law with navigational rules, and to the federal interest in ensuring uniformity in those rules, in defining the scope of the nexus requirement. *Id.* at 675. Although this approach has its difficulties, *see id.* at 682 (Powell, J., dissenting), it does attempt to determine which aspects of maritime activity are worthy of federal concern. Using this approach, the Court decided that a federal interest is served by having a uniform standard of conduct with respect to navigation on the navigable waterways. This uniform standard of conduct is ensured by federal laws governing the navigation of all vessels, including pleasure craft. *See* 33 U.S.C. §§ 2001-2073. Although federal laws also regulate fire safety aboard vessels,[3] the application of uniform fire safety laws to pleasure craft is not necessary to ensure the smooth flow of maritime commerce. By contrast, the comprehensive federal regulation of navigation through uniform "Rules of the Road" is essential to ongoing maritime commercial activity; if pleasure boats followed different rules than commercial vessels, they could disrupt the flow of commerce substantially. *But see* commentary cited *infra* note 4. Thus it seems that the federal interest invoked in *Foremost* is more at stake in the regulation of navigation than it is in the regulation of maritime fire safety.

Further, even if logic and the demands of a comprehensible framework of analysis might draw us to treat fire—even at a mooring—as the twin of collision when maritime hazards are involved, we would feel constrained by the Supreme Court's repeated use of specific language in assessing what constitutes "traditional maritime activity."

[3] Federal regulations currently govern fire prevention and portable fire extinguishers on all vessels, including pleasure craft. 46 C.F.R. §§ 72.03, 76.05-25. The now-repealed Motor Boat Act of 1940 also contained a number of sections relating to fire safety. 46 U.S.C. §§ 526g-526j (repealed 1983).

We have already noted that the *Foremost* court, when identifying traditional maritime activity or concerns, consistently mentioned "maritime commerce," "navigation," or "operation of a vessel." *See* 454 U.S. at 674-77.[4] Similarly, in *Executive Jet*, the Court described the necessary maritime nexus as "some relationship between the tort and traditional maritime activities, involving *navigation* or *commerce* on navigable waters." 409 U.S. at 256 (emphasis supplied). As the Fourth Circuit has noted:

> [I]n the context of the *Executive Jet* test, the *Foremost* decision reasserted the importance of navigation in establishing a sufficient nexus. The Supreme Court confirmed what was recognized by this court in *Richardson*; that is, controversies involving the navigation of vessels on navigable waters may come within the admiralty jurisdiction, although the vessels may be small pleasure boats.

Oliver by Oliver v. Hardesty, 745 F.2d 317, 319 (4th Cir. 1984).

In cases where there is an immediate threat to commercial shipping (as might be posed, for example, by a fire at a municipal dock serving all types of vessels), admiralty jurisdiction will clearly be invoked. However, in cases where the threat to commercial shipping is not direct or immediate, we are compelled to conclude that Supreme Court precedent to date recognizes torts involving pleasure boats as "maritime" only if there is at least a potential threat to commercial shipping, and only if "navi-

[4] The Supreme Court, in a much earlier case, noted that if it were to require a cause of action in tort to be of a maritime nature, it would look to "the relation of the wrong to maritime service, to navigation and to commerce on navigable waters." *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 62 (1914) (quoted in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 258 (1972)).

gation" is implicated.[5] This may be too narrow and mechanical an interpretation of the Supreme Court. But the specific language of the Court seems to support it. And, as noted above, the Supreme Court's invocation of the need for uniform "Rules of the Road" as a touchstone where navigation or a collision is involved provides further support for this restrictive conclusion.[6] In the present case, if the Ultorian had been underway in the shipping channel when the fire broke out, we might reach a different result.

Even if we were not confined by the Supreme Court's repeated references to "navigation" as the traditional maritime activity in this context, there are reasons for declining to extend the nexus test to include fires on pleasure craft as a matter of course. First and most important, if this sort of fire were to join navigation as a "traditional concern" of maritime law, it would be nearly impossible to establish any limiting principle with respect

[5] We stress that where commercial shipping is *actually* implicated, then admiralty jurisdiction is clearly invoked. However, where there is only a *potential* threat to commercial shipping (as was the case, for example, in *Executive Jet*), and where commercial vessels are not actually involved, we view the "navigation" requirement as a necessary limitation of an otherwise very broad category of accidents.

[6] The asserted need for uniform Rules of the Road as a basis for admiralty jurisdiction is frequently invoked by courts. *See, e.g., In re Paradise Holdings, Inc.*, 795 F.2d 756, 760 (9th Cir.), *cert. denied*, 479 U.S. 1008 (1986); *Hogan v. Overman*, 767 F.2d 1093, 1094 n.1 (4th Cir. 1985); *Finneseth v. Carter*, 712 F.2d 1041, 1046-47 (6th Cir. 1983). It is just as frequently criticized by commentators. *See, e.g.*, Carnilla & Drzal, Foremost Insurance Co. v. Richardson, *If this is Water, It Must be Admiralty*, 59 Wash. L. Rev. 1, 6-7 (1983); Stolz, *Pleasure Boating and Admiralty*: Erie *at Sea*, 51 Calif. L. Rev. 661, 713-14 (1963); Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard*, 34 Wash. & Lee L. Rev. 121, 132 (1977); *see also Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 682 (1981) (Powell, J., dissenting).

to what satisfies the nexus requirement. *Cf.* Baer, *Admiralty Law and the Supreme Court* § 25-4 (3d ed. 1979 & Supp. 1985) (summarizing *Foremost* and predicting that "a limitation [may be] placed on the scope of the Court's opinion"). For example, there would appear to be no way to distinguish the present case from the case of a pleasure boat that was moored too loosely during a storm and collided with a neighboring boat, or the case of a pleasure boat damaged by the swinging boom of a nearby sailboat. Indeed, without navigation[7] as the distinguishing feature, the new "nexus" test becomes identical with the old "navigable waters" test (at least for "vessels"), in defiance of the rule set out in *Executive Jet* and *Foremost*. Further, we do not think it appropriate to analogize broadly from navigation to fire in the context of a moored pleasure boat in the face of widespread scholarly criticism of the exercise of admiralty jurisdiction over pleasure boat torts. *See, e.g.*, Carnilla & Drzal, Foremost Insurance Co. v. Richardson: *If this is Water, It Must be Admiralty*, 59 Wash. L. Rev. 1 (1983) (criticizing *Foremost*'s assertion of admiralty jurisdiction over collision between small pleasure boats); Stolz, *Pleasure Boating and Admiralty*: Erie *at Sea*, 51 Calif. L. Rev. 861 (1963) (law of pleasure boating should be developed by state courts and legislatures); Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard*, 34 Wash. & Lee L. Rev. 121, 139-40 (1977) (in cases of pleasure craft torts, courts must determine "whether the exercise of jurisdiction furthers the commercial interests which admiralty courts were created to serve"); *cf.* 7A J. Moore & A.

[7] Because we are here dealing with a case that clearly does not involve navigation, we do not address the definitional difficulties involved in that concept. The difficult case might be a tort caused by a vessel in motion on the water that was not being deliberately "navigated" at the time (as when a boat slips its mooring). In that case, the Rules of the Road might be irrelevant to the hazard; however, an argument could be made that the vessel was "in navigation" because it was in motion on the navigable waters.

Palaez, *Moore's Federal Practice* ¶ .325[5] (2d ed. 1988) (admiralty tort jurisdiction should be limited to matters concerning maritime industry); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 250 (1950) (same).

Thus, there is a basis for the somewhat narrow interpretation followed in many of the recent decisions of other circuits concerned with the scope of admiralty jurisdiction in tort actions involving pleasure craft.[8] And this interpretation is reassuring to those who perceive important principles of federalism in these distinctions. *See, e.g., Foremost*, 457 U.S. at 685 ("federalism concern is the dominating issue in the case") (Powell, J., dissenting).

Accordingly, we affirm the district court's conclusion that Sisson lacks subject-matter jurisdiction under 28 U.S.C. § 1333.

II.

Sisson also argues that the Limitation of Liability Act provides a separate basis of admiralty jurisdiction.[9] Al-

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[8] *See, e.g., Hogan v. Overman*, 767 F.2d 1093, 1094 (4th Cir. 1985) (admiralty jurisdiction exists where navigational error of pleasure boat caused water skier to be injured); *Medina v. Perez*, 733 F.2d 170, 171 (1st Cir. 1984) (admiralty jurisdiction found where negligent navigation of pleasure boat injured swimmer), *cert. denied*, 469 U.S. 1106 (1985); *Smith v. Knowles*, 642 F. Supp. 1137, 1140 (D. Mo. 1986) (no admiralty jurisdiction over pleasure boat passenger's drowning because boat owner's "estimate of water's depth did not affect the navigation of the boat"); *see also In re Paradise Holdings, Inc.*, 795 F.2d 756, 760 (9th Cir. 1986) (admiralty jurisdiction found in case where "negligent operation of a vessel" resulted in death of body surfer); *Finneseth v. Carter*, 712 F.2d 1041, 1043 (6th Cir. 1983) (parties agreed that collision of two pleasure craft constituted traditional maritime activity).

[9] The district court was probably not incorrect in holding that Sisson could not raise this argument for the first time in a motion for reconsideration of the court's dismissal of his action for lack of subject-matter jurisdiction. *See Publishers Resource Inc.*

(Footnote continued on following page)

though the Act is not cast in jurisdictional terms, the Supreme Court in 1911 interpreted what is now section 189 of the Limitation of Liability Act[10] as expanding the scope of liability subject to limitation to include nonmaritime, as well as maritime, torts. *Richardson v. Harmon*, 222 U.S. 96, 106 (1911). Sisson contends that because the right of limitation under section 189 "does not depend on the maritime nature of the liability, jurisdiction under the Limitation Act is not coextensive with admiralty jurisdiction in tort." Brief of Plaintiff-Appellant at 12 (emphasis omitted).

In *Richardson v. Harmon*, the owners of a steam barge that had collided with a bridge sought to limit their liability for damage to the bridge. The Supreme Court noted that, prior to the enactment of section 189, there was no admiralty jurisdiction over an action against a shipowner for damage occurring on land. "The tort would have been a nonmaritime tort, and, as such, not within the cognizance of an admiralty court." *Id.* at 101. The Court, by finding that section 189 included nonmaritime torts within

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[9] *continued*

v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985). We have recognized, however, that a "court's discretion to dismiss for lack of subject matter jurisdiction when the plaintiff could have pleaded the existence of jurisdiction and when in fact jurisdiction exists, should be exercised sparingly." *Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp.*, 523 F.2d 543, 549 (7th Cir. 1975). Thus, we will address the matter on the merits.

[10] Section 189 provides in part:

> The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending
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> . . . .

46 U.S.C § 189. When enacted (and at the time the Court decided *Richardson v. Harmon*, 222 U.S. 96 (1911)), section 189 was section 18 of the Shipping Act of 1884. For the sake of simplicity we will use the designation "section 189" throughout this opinion.

the Limitation of Liability Act, was able to allow the commercial vessel (that had been traveling on navigable waters) to limit its liability for the collision that caused damage to the bridge, a structure on land.

We question the applicability of *Richardson v. Harmon* to the present case in some part at least because the need that inspired that decision no longer exists. Section 189 was enacted to further the policy of the Limitation of Liability Act—to permit a shipowner to limit his risk to his interest in the ship—by allowing limitation of liability even when the damage resulted on land. That section 189 was intended to improve the competitive position of owners of commercial ships in this fashion is evidenced by its title when enacted: "An Act to Remove Certain Burdens on the American Merchant Marine, and Encourage the American Foreign Carrying Trade, and for Other Purposes." *See Richardson v. Harmon*, 222 U.S. at 101.

In 1948, however, Congress enacted the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, which provides in part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In passing this Act, Congress sought to "provide a remedy for damage done to land structures by ships on navigable waters." *Executive Jet*, 409 U.S. at 260; *see* S. Rep. No. 1593, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. & Admin. News 1898, 1899. Although the Extension of Admiralty Jurisdiction Act does not specifically supplant (or as the district court said here, "codify") *Richardson v. Harmon*, it does eliminate the need and reason for the rule established by the case; for now torts are "maritime" even when the damage occurs on land (and there is therefore no question that limitation of liability is available).

Perhaps more importantly, most of the cases involving issues related to the scope of admiralty jurisdiction under the Limitation of Liability Act were decided prior to the Supreme Court's decisions in *Executive Jet* and *Foremost*. During that time, the test for admiralty jurisdiction under 28 U.S.C. § 1333 was exclusively one of "locality." Thus, it is not surprising and seems rational policy that as long as "the event giving rise to the claims occurred on navigable waters" the owner of the vessel that caused the damage could limit his liability under the Act. G. Gilmore & C. Black, *The Law of Admiralty* 843-44 (1975). During this period, admiralty jurisdiction under the Limitation of Liability Act—although purportedly invoking a separate basis of jurisdiction—did not ignore completely the requirements of admiralty jurisdiction under section 1333. Even though it was not necessary that the *damage* occur on navigable water, there remained the requirement that the *vessel* involved in the tort bear a "relation" to navigable waters. *See, e.g., In re Builder's Supply*, 278 F. Supp. 254, 258 (N.D. Iowa 1968). Petitioners here readily concede that this "relation" is still a necessary ingredient of jurisdiction under the Limitation of Liability Act. Thus, vessel owners seeking to limit their liability are not relieved altogether from satisfying the locality test. The requirements of that test are merely somewhat relaxed.

Now that the test for admiralty jurisdiction under section 1333 contains a nexus as well as a locality requirement, we must decide how the test for jurisdiction under the Limitation of Liability Act should reflect this additional dimension of admiralty jurisdiction. Specifically, we are presented with the question whether a court may assert admiralty jurisdiction over a limitation of liability action when the underlying tort fails to qualify as maritime because it is not "functionally" within the admiralty jurisdiction (since it is unconnected to traditional maritime activity). For the reasons which follow, we do not accept Sisson's contention that the nexus requirement for admiralty jurisdiction over the tort is irrelevant to the determination whether the Limitation of Liability Act independently confers admiralty jurisdiction.

In our view, when a cause of action in tort does not bear any connection to traditional maritime activity, there is no justification for allowing the Limitation of Liability Act—which provides for a practice apparently defensible only in a traditional maritime context—to provide an independent basis for admiralty jurisdiction. It is true that the Supreme Court allowed limitation of liability to be extended geographically beyond normal admiralty jurisdictional bounds. But *Richardson v. Harmon*, in extending limitation to liability for damage occurring on land, furthered the purposes of both admiralty jurisdiction in general and of the Limitation of Liability Act in particular. If the purpose of limitation was to improve the competitive position of the American shipping industry, it would make no sense to exclude damages which quite fortuitously impacted on land and not, for example, on another vessel. Thus, shipowners were allowed to limit their liability to the value of the vessel for all damage caused by the ship or its crew whether seaward or landward. No similar policy would be furthered, however, by allowing limitation for torts which bear no relation to traditional maritime activity; under those circumstances the competitive rationale would make no sense. If pleasure boating is to be excluded from admiralty jurisdiction for functional reasons, we should not extend limitation of liability in the face of those same reasons.

We believe that allowing admiralty jurisdiction here would be contrary to the policy of *Executive Jet* and *Foremost*. In creating the nexus requirement, the Supreme Court confined the reach of admiralty jurisdiction to include only those tort actions with which a uniform, sea-going jurisprudence should be concerned. To permit an alleged tortfeasor to circumvent the requirement that the tort bear a connection to traditional maritime activity simply by asserting a right to limit liability would eviscerate the nexus test. It would also lead to inequity between the parties if only the owner of the vessel causing the injury may claim jurisdiction under the Limitation of Liability Act. It appears that an injured party who wishes

to avail itself of the benefits of admiralty law would still be required to satisfy both the nexus and the locality tests.

Asserting admiralty jurisdiction over this case would also be inconsistent with principles of federalism espoused by the Supreme Court in *Executive Jet*. There the Court found that the crash of an airplane, originating in one state and destined for another, was only "fortuitously and incidentally connected to navigable waters" and, as such, bore "no relationship to traditional maritime activity." 409 U.S. at 249. Holding that this crash was outside the scope of admiralty jurisdiction, the Court explained that a state court "could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] tort law without any effect on maritime endeavors." *Id.* (footnotes omitted). Similarly, in the present case, the claims of other boat owners and of the owner of the marina could "plainly" be heard in state court without the intrusion of traditional maritime law concepts.

Apparently no other court has addressed the precise question we are attempting to resolve here: whether an action to limit liability is within the scope of admiralty jurisdiction when the underlying wrong bears no relation to traditional maritime concerns. As we noted above, this question would not have arisen prior to *Executive Jet*. We have reviewed the cases published after that decision in which vessel owners had sought exoneration under the Limitation of Liability Act. In all of those cases, disputes over subject-matter jurisdiction were resolved by analyzing whether the alleged torts satisfied the locality and nexus requirements. *See, e.g., In re Paradise Holdings, Inc.*, 795 F.2d 756, 758-60 (9th Cir.), *cert. denied*, 479 U.S. 1008 (1986); *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251, 1252-54 (8th Cir. 1980); *In re Brown*, 536 F. Supp. 750, 751-52 (N.D. Ohio 1982); *Clinton Bd. of Park Comm'rs v. Claussen*, 410 F. Supp. 320, 323-26 (S.D. Iowa 1976). If those courts had thought that the Limitation of Liability Act provided an independent basis of jurisdiction, irrespective of any relation to tradi-

tional maritime concerns, it would have been simpler for them to sustain jurisdiction on that ground. That none of the courts opted for this approach may call into question the continued validity of the Limitation of Liability Act as an independent basis of admiralty jurisdiction in these circumstances.

For all of the reasons stated, we hold that a proceeding under the Limitation of Liability Act will be cognizable in admiralty only when the underlying tort has a relationship to traditional maritime activity.[11] Accordingly, the district court's dismissal of this action for want of subject-matter jurisdiction is

AFFIRMED.

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[11] Courts from a number of circuits have split on the issue whether the Limitation of Liability Act applies to pleasure craft. *Compare Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937); *Warnken v. Moody*, 22 F.2d 960 (5th Cir. 1927); *In the Matter of Michael Roberto*, 1987 A.M.C. 982 (D.N.J. 1986); *Complaint of Brown*, 536 F. Supp. 750 (N.D. Ohio 1982); *Armour v. Gradler*, 448 F. Supp. 741 (W.D. Penn. 1978); *Application of Theisen*, 349 F. Supp. 737 (E.D.N.Y. 1972); *In re Klarman*, 295 F. Supp. 1021 (D. Conn. 1968); *Petition of Porter*, 272 F. Supp. 282 (S.D. Tex. 1967); *Petition of Colonial Trust Co.*, 124 F. Supp. 73 (D. Conn. 1954) (all holding Limitation of Liability Act applicable to pleasure craft) *with In re Lowing*, 635 F. Supp. 520 (W.D. Mich. 1986); *In re Tracey*, 608 F. Supp. 263 (D. Mass. 1985); *Baldassano v. Larsen*, 580 F. Supp. 415 (D. Minn. 1984); *Kulack v. The Pearl Jack*, 79 F. Supp. 802 (W.D. Mich. 1948) (all holding Limitation of Liability Act inapplicable to pleasure craft). Because we affirm the dismissal of Sisson's action for lack of subject-matter jurisdiction, we need not decide whether a pleasure boat owner may limit his liability for a tort that satisfies both the nexus and locality requirements of admiralty jurisdiction.

RIPPLE, *Circuit Judge*, concurring in the judgment. The majority opinion is a careful effort to apply faithfully the Supreme Court's holding in *Foremost Insurance Co. v. Richardson*, 457 U.S. 68 (1982). In my view, the court reaches the correct result. The fire that caused the damage here occurred in a pleasure boat tied to a dock within the well-delineated confines of a marina dedicated exclusively to the wharfage of pleasure boats. It presented no harm to maritime commerce.

I write separately because the test adopted by the court, while producing the correct result in this case, will place inappropriate restrictions on admiralty jurisdiction in other instances. In my view, *Foremost* does not compel restricting admiralty jurisdiction in noncommercial activities to matters directly involving the navigation of a vessel. In *Foremost*, the Supreme Court had to deal with an incident arising out of an alleged noncompliance with the "Rules of the Road." However, I do not read the Supreme Court's opinion as necessarily precluding jurisdiction based on other hazards traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce.

Hopefully, before long, the Supreme Court will revisit this quagmire and resolve the current ambiguity generated by the courts of appeals in the wake of *Foremost*.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 16, 1989.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

Nos. 87-2713 and 87-2736

IN THE MATTER OF:
The Complaint of EVERETT A. SISSON, as owner of the motor yacht, The Ultorian, for exoneration from or limitation of liability,

Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 1991—**Nicholas J. Bua**, *Judge.*

ORDER

On consideration of the Petition for Rehearing with Suggestion for Rehearing En Banc filed by counsel for the plaintiff-appellant in the above-named cause and the response thereto by appellee, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

RIPPLE, *Circuit Judge*, concurring. I join in the denial of the petition for rehearing. The matters raised in that petition were examined by the panel during its consideration of the merits, and I do not believe that further examination by the panel would be fruitful.

I have also decided not to call for a vote on the suggestion for rehearing en banc. This circuit sees little in the way of admiralty litigation and here the result, if not the articulated rule of decision, is correct. Before this court revisits the area again, there is every probability that the Supreme Court will have an opportunity to supply further guidance with respect to its decision in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982).

APPENDIX 3

[663 Supp. 858 (N.D. Ill. 1987)]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 1991 Date: June 29, 1987

Name of Assigned Judge: BUA

Case Title: IN RE: EVERETT A. SISSON

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Order cause dismissed for lack of subject matter jurisdiction. Motion to find case 87 C 652 related to the instant cause is DENIED.

* * * * *

(12) ☒ (For further detail see * * * ☒ order attached to the original minute order form.)

[Docketed July 1, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF

The Complaint of Everett A. Sisson, as Owner of the Motor Yacht, THE ULTORIAN, for Exoneration From or Limitation of Liability.

No. 86 C 1991 — Honorable Nicholas J. Bua, Presiding

ORDER

This order concerns claimants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction. For the reasons stated herein, claimants' motion to dismiss is granted.

I. FACTS

On September 24, 1985, plaintiff's 56-foot pleasure yacht, The Ultorian, was docked at Washington Park Marina in Michigan City, Indiana. A fire erupted on The Ultorian completely destroying the vessel and causing extensive damage to the marina and several neighboring boats. According to allegations made by plaintiff in a related suit against the manufacturer of The Ultorian, the fire was caused by an allegedly defective washer/dryer on board the vessel. The net value of The Ultorian after the casualty was $800. Extensive damage to the marina and vessels in the vicinity of The Ultorian resulted from the fire. The claimant owners of the vessels and marina estimate damages to exceed $275,000.

II. DISCUSSION

Plaintiff instituted this action for injunctive declaratory relief seeking to limit his liability to claimants for damages arising out of the September 24 incident. Plaintiff asserts jurisdiction under 28 U.S.C. §1333 and contends that the Limitation of Liability Act, 46 U.S.C. §183[1] limits his potential liability to $800, the salvage value of The Ultorian. Claimants motion to dismiss plaintiff's actions on two grounds. First, claimants assert that admiralty and maritime jurisdiction under §1333 does not exist in the present case. Second, claimants argue that the Limitation of Liability Act does not apply to pleasure craft. Because this court finds subject matter jurisdiction is lacking, claimants' second argument is not addressed below.

As the purpose of plaintiff's action is to limit possible tort liability, this court must analyze admiralty jurisdiction principles applicable to tort cases. Traditionally, federal admiralty jurisdiction in tort cases existed whenever the actionable wrong occurred on a navigable waterway. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971); *The Plymouth*, 3 Wall. 20, 35-36 (1866). Subsequent decisions of the Supreme Court, however, have added a second prerequisite. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972). To establish admiralty jurisdiction in a tort case today, not only must the wrong occur on navigable waters, but the tort must bear a "significant relationship to traditional maritime activity." *Foremost*, 457 U.S. at 674-75; *Executive Jet*, 409 U.S. at 268.

[1] The Limitation of Liability Act provides in pertinent part:

> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owners or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. 46 U.S.C. §183.

In *Executive Jet*, the Supreme Court addressed whether admiralty jurisdiciton existed over tort claims arising from the crash of a small commercial passenger jet into Lake Erie. *Executive Jet*, 409 U.S. at 250. The cause of the crash was assigned to the ingestion of birds in the plane's engines while the jet was still over the runway. *Id.* Plaintiffs contended that although the alleged negligent conduct of the traffic controllers in failing to warn of the birds occurred on land, the fact the jet was damaged upon impact with the navigable waters of Lake Erie gave rise to admiralty jurisdiction. *Id.* at 266-67. Rejecting the traditional locality rule as the sole test for determining admiralty jurisdiction, the Court ruled §1333 jurisdiction existed only when the actionable conduct "bears a significant relationship to traditional maritime activity." *Id.* at 268. Because the wrong complained of by plaintiffs had no connection with "traditional forms of maritime commerce or nagivation," the Court concluded admiralty jurisdiction did not exist and ordered plaintiffs' actions dismissed. *Id.* at 272.

In *Foremost Ins. Co. v. Richardson*, the Supreme Court specifically rejected the contention that admiralty jurisdiction depended on whether the actionable conduct arises in the context of some commercial maritime activity. *Foremost*, 457 U.S. at 674-76. In that case, the collision of two small pleasure craft on navigable waters resulted in the death of an occupant. *Id.* at 669. The decedent's wife instituted a tort action for damages against the operator of the other boat in federal district court asserting admiralty jurisdiction. *Id.* Addressing the assertion that admiralty jurisdiction was limited to situations involving some aspect of commercial maritime activity, the Court explained the federal interest in protecting maritime commerce could not be adequately served if admiralty jurisdiction extended only to those actually engaged in commercial maritime activity. *Id.* at 674-75. According to the Court, the federal interest could be fully protected "only

if all operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial activity on maritime commerce." *Id.* at 675. Thus, the fact noncommercial vessels were involved in the activity leading to the actionable conduct did not preclude the existence of a significant relationship to traditional maritime activity. *Id.* at 676. Centering on the fact that the alleged wrong involved the negligent navigation of a vessel on navigable waters, the Court concluded that the tortious conduct had a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction. *Id.* at 674.

Lower courts applying the two-part *Executive Jet/Foremost* test in tort cases involving pleasure craft focus on the existence of a navigational error to find admiralty jurisdiction. *See Hogan v. Overman*, 767 F.2d 1093 (4th Cir. 1985) (allegation that swimmer was injured due to alleged navigational error sufficient to show substantial relationship with traditional maritime activity); *Souther v. Thompson*, 754 F.2d 151 (4th Cir. 1985) (no admiralty jurisdiction exists where controversy involving pleasure boats does not arise out of alleged navigational error); *Oliver by Oliver v. Hardesty*, 745 F.2d 317 (4th Cir. 1984) (proper emphasis for ascertaining admiralty jurisdiction in cases involving pleasure boats is on the navigation of such vessels); *Medina v. Perez*, 733 F.2d 170 (1st Cir. 1984) (admiralty jurisdiction found where alleged negligent navigation of pleasure vessel resulted in injury to swimmer); *Smith v. Knowles*, 642 F.Supp. 1137 (D. Md. 1986) (action against owner and operator of small motorboat arising when decedent jumped overboard to urinate and drowned dismissed for lack of admiralty jurisdiction as misjudgment of water's depth was not a navigational error nor a negligent act which might have affected traditional maritime activity). Analyzing the Supreme Court's statements in *Foremost* and *Executive Jet* emphasizing the need for uniform rules governing navigation of vessels on navigable waters, these lower courts concluded that

some type of navigational error must be alleged to find a significant relationship with traditional maritime activity when pleasure craft are involved. *Hogan v. Overman*, 767 F.2d at 1094; *Souther v. Thompson*, 754 F.2d at 153; *Oliver by Oliver v. Hardesty*, 745 F.2d at 319; *Medina v. Perez*, 733 F.2d at 171; *Smith v. Knowles*, 642 F.Supp. at 1139-40. The rationale for focusing on an alleged navigational error stems from the Supreme Court's reasoning in *Foremost* that although ownership and operation of pleasure boats cannot be viewed as a traditional maritime activity, extension of admiralty jurisdiction is warranted where operation of pleasure craft might interfere with commercial vessels. *Smith v. Knowles*, 642 F.Supp. at 1139, *citing Foremost*, 457 U.S. at 675. Thus, as one court observed, the clear import of the *Foremost* decision is that admiralty jurisdiction exists only when the wrongful conduct presents a significant risk of damaging or delaying commercial vessels. *Smith v. Knowles*, 642 F.Supp. at 1139.

Recently, certain courts addressing product liability claims of laborers installing asbestos materials in commercial vessels have developed a four-factor test for determining whether the alleged wrong bears a significant relationship to traditional maritime activity. *See e.g., Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 639-41 (5th Cir. 1985), *reaffirming Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973). These four factors include: (1) functions and roles of the parties; (2) types of vehicles and instrumentalities involved; (3) causation and type of injury; and (4) traditional concepts of the role of admiralty law. *Id.* Courts analyzing the tort claims of shipyard employees under this four-part test universally determined that the wrong alleged did not bear a substantial relationship to traditional maritime activity. *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985); *Woessner v. Johns-Manville Corp.*, 757 F.2d 634, 639-41 (5th Cir. 1985); *Harville v. Johns-Manfille Prod. Corp.*, 731 F.2d 775, 787 (11th Cir. 1984); *Myhran v. Johns-Manville Corp.*,

741 F.2d 1119, 1121 (9th Cir. 1984). Other circuits addressing similar asbestosis claims under the assertion of admiralty jurisdiction came to the same result but declined to adopt the four-part test. *Austin v. Unarco Ind., Inc.*, 705 F.2d 1, 11-14 (1st Cir. 1983) (focusing on function the injured party was performing at time of injury); *Keene Corp. v. United States*, 700 F.2d 846, 844-45 (2d Cir. 1983) (emphasizing defective product was not designed specifically for maritime use). Nonetheless, the four-factor test appears to be the majority position.

Without addressing whether the Seventh Circuit is likely to adopt the four-part analysis, certain difficulties arise in applying this test to tort cases involving pleasure craft. One court analyzing the four-prong test reasoned that when applied to situations involving pleasure craft, the four factors essentially boil down to two: factors three (causation and type of injury) and four (traditional concepts of the role of admiralty law) combine into a "hit the tanker test," while factors one (function and roles of parties) and two (type of vehicles and instrumentalities involved) comprise a "substantial relationship test." *Smith v. Knowles*, 642 F.Supp. at 1139. This synthesis stems from the discussion in *Foremost* concerning the ability of pleasure boats to interfere with commercial vessels. *Id.* According to the *Smith* court, "the traditional role of admiralty law (factor four) is to protect maritime commerce. . . . Thus, if the causation and type of injury (factor three) might have damaged or delayed a tanker, jurisdiction would lie." *Id.* Regarding factors one and two, the *Smith* court reasoned that although the falling plane in *Executive Jet* might have struck a tanker, "flying a plane does not bear a substantial relationship to traditional maritime activity." *Id.* Although acknowledging its summation of the four-factor test might not be flawless, the court displayed confidence that the "hit the tanker test" was premised on an accurate reading of *Foremost*. *Id.* at 1140. Applying its analysis to the facts before it, the court concluded the boat owner's error estimating water depth while encouraging a guest to jump overboard did not bear a substantial relationship to traditional maritime activity because such conduct could not result in a collision with a tanker. *Id.* Concluding that even if the "hit the tanker" test was incorrect, the court stated that common sense dictated that admiralty jurisdiction was not intended to apply to cases like the one before it. *Id.*

This court shares the view expressed in *Smith v. Knowles* that when applied to pleasure boating incidents, the four-factor test developed in asbestosis cases telescopes into a two-part inquiry: (1) whether the tort involved vehicles or objects of a maritime nature and parties performing some function or role with a substantial relation to traditional maritime activity; and (2) whether the conduct complained of presents a substantial likelihood of impeding commercial vessels. In the present case, no dispute exists that the wrong occurred on navigable waters. Thus, the first *Executive Jet/Foremost* requirement for admiralty jurisdiction is present. Difficulty arises, however, in finding the alleged wrong bears a substantial relation to traditional maritime activity. Here, although the vehicles involved, pleasure boats, are distinctly maritime in nature, the instrumentality blamed for the fire, a washer/dryer, is not. The fact the parties involved are boat and marina owners is of little relevance in this case as this court has no indication of what function or activity the parties were engaging in at the time of the fire. Most importantly, however, the mooring of a pleasure craft with a defective washer/dryer in a recreational marina such as Washington Park presents no substantial likelihood that a tanker would be damaged or delayed. Unlike cases involving pleasure boats where admiralty jurisdiction is recognized,[2]

[2] Plaintiff asserts *Hassinger v. Tideland Electric Membership Corp.*, 781 F.2d 1022 (4th Cir. 1986), compels a finding of admiralty jurisdiction in the present case. This court disagrees. *Hassinger* involved wrongful death actions by estates of three sailors who were electrocuted when the uninsulated mast of their sailboat struck an uninsulated power line negligently placed over navigable waters by an electric company. *Id.* at 1024. Reasoning that the

(Footnote continued on following page)

the wrong in the present case does not involve navigation of a vessel. Other courts addressing assertions of admiralty jurisdiction for injuries occurring while pleasure craft are not in navigation have failed to find any substantial relationship with traditional maritime activity. *See Smith v. Knowles, supra*; *Montgomery v. Harrold*, 473 F.Supp. 61, 64 (E.D. Mich. 1979) (guest asphyxiated by lethal fumes while aboard pleasure craft moored in marina; decedent's estate fails to show substantial relation to traditional maritime activity under four-factor test).

Plaintiff, however, contends that similarities between this case and *American Eastern Dev. Corp. v. Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979), and *English Whipple Sailyard, Ltd. v. Yawl Ardent*, 459 F.Supp. 866 (W.D. Pa. 1978), compel the conclusion admiralty jurisdiction exists. However, a close reading of both cases indicates that admiralty jurisdiction was premised on breaches of maritime contracts. The *Executive Jet/Foremost* test for admiralty jurisdiction in tort cases does not apply to contract claims. Admiralty jurisdiction over contract claims "depends on whether the contract relates to ships in their use as ships or to commerce or transportation in navigable waters." *Medema v. Gombo's Marina Corp.*, 97 F.R.D. 14, 15 (N.D. Ill. 1982), *quoting Ford Motor Co. v. Wallenius Lines, M/V Atl. Cinderella*, 476 F.Supp. 1362, 1365 (E.D. Va. 1979).

In *English Whipple*, a sailboat dealer being unable to negotiate payment for repairs to defendant's pleasure boat brought an action in rem against the vessel. *English Whipple*, 459 F.Supp. at 869, 873. The boat owner counterclaimed for breach of contract and negligence. *Id.* Al-

[2] *continued*
sailboat was engaged in a navigational function at the time it contacted the power line, and that the placement of the power line created a dangerous impediment to navigation, the court sustained admiralty jurisdiction. *Id.* at 1027-28. The focus of the *Hassinger* court on navigation and impediments to navigation clearly makes any application to the present case inappropriate.

though the decision is devoid of any discussion concerning admiralty jurisdiction, the claim of the party instituting the action clearly arose in contract. Contract claims for repair or maintenance of maritime vessels are within the admiralty jurisdiction of the federal courts. *See e.g., CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377 (2d Cir. 1982).

Similarly, in *American Eastern*, claims asserted by plaintiff boat owners against the defendant marina sounded in contract. In *American Eastern*, boat owners contracted with a marina for the dry storage of their vessels which were subsequently damaged in a fire set by the marina's president. *American Eastern*, 608 F.2d at 124. Although the boat owners clearly asserted certain tort claims against the marina for the damage to their vessel, it is also clear they premised certain claims on storage contracts with the marina. According to the contract, the marina was required to store the vessels in dry storage racks until the owners desired to use them. *Id.* At such time, the boats would be forklifted into the water and then returned to dry storage at the end of the day. *Id.* Discussing whether the contract for dry storage was maritime in nature, the court reviewed decisions involving maritime liens for docking wharfage and storage fees.[3] *Id.* at 125. The court found that the distinguishing factor between cases imposing maritime liens for breach of docking, wharfage or storage contracts and those denying such liens was whether the vessels were completely removed from navigation. *Id.* Reasoning that the nature of the storage contracts in its case cut against the conclusion the boats were removed from navigation, the court ruled that the dry storage contracts fell within the court's admiralty jurisdiction. *Id.*

[3] Contracts to provide wharfage or storage of a vessel are maritime in nature, and breach of such agreements are cognizable in admiralty. *Selame Assoc., Inc. v. Holiday Ins., Inc.*, 451 F.Supp. 412, 418 (D. Mass. 1978).

Significantly, the *American Eastern* opinion contains no mention of *Executive Jet* or of the four-factor maritime nexus test which was originally formulated by the Fifth Circuit in *Kelley v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973). Although *American Eastern* does not state the specific theories of recovery asserted by the boat owners, it is apparent that boat owners were relying in part on rights and duties arising from the dry storage contract. Because the contract created a bailment relationship each time the boats were removed from the water and placed in the marina's dry storage racks, the marina, as bailee, had a duty to use reasonable care to protect the bailors from loss. Breach of this duty to exercise reasonable care provides both a contract claim and a tort claim. *Holmes v. Freeman*, 23 Conn.Supp. 504, 185 Atl.2d 88, 91 (Conn. App. Ct. 1962) (liability for damage to bailed property may spring either from tort or from contract). Once finding admiralty jurisdiction over the boat owners' contract claims, the *American Eastern* court was empowered by principles of pendent jurisdiction to entertain the tort claims. *See Medema v. Gombo's Marina Corp.*, 97 F.R.D. 14, 15 (N.D. Ill. 1982) (boat owner sues in contract and tort for damage to boat at marina in winter storage resulting from fire; court finds admiralty jurisdiction over contract claims arising out of bailment relationship and sustains negligence claim under pendent jurisdiction principles).

The findings of admiralty jurisdiction in *American Eastern* and *English Whipple* were not based on claims sounding in tort, but were instead premised on the parties' contractual relationships. As such, those cases do not aid plaintiff in his argument that admiralty jurisdiction exists in the present case. Because this court finds that wrong alleged fails to bear a substantial relationship to traditional maritime activity, admiralty jurisdiction is lacking and claimants' motion to dismiss must be granted.

III. CONCLUSION

For the foregoing reasons, claimants' motion to dismiss for lack of subject matter jurisdiction is granted.

IT IS SO ORDERED.

/s/ NICHOLAS J. BUA
Nicholas J. Bua
Judge, United States District Court

Dated: June 29, 1987

APPENDIX 4

[668 F. Supp. 1196 (N.D. Ill. 1987)]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 1991 Date: September 24, 1987

Name of Assigned Judge: BUA

Case Title: IN THE MATTER OF EVERETT SISSON

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Petitioner's motion for reconsideration of dismissal is DENIED.

* * * * *

(12) ☒ (For further detail see * * * ☒ order attached to the original minute order form.)

[Docketed September 25, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF
the Complaint of EVERETT SISSON,
as owner of the Motor Yacht, THE
ULTORIAN, for exoneration from or
limitation of liability

No. 86 C 1991 – Honorable Nicholas J. Bua, Presiding

ORDER

Before this court is petitioner's motion for reconsideration of this court's order dismissing petitioner's action for lack of subject matter jurisdiction. For the reasons stated herein, petitioner's motion for reconsideration is denied.

I. FACTS

On September 24, 1985, petitioner's 56-foot pleasure yacht, The Ultorian, was docked at Washington Park Marina in Michigan City, Indiana. A fire erupted on The Ultorian completely destroying the vessel and causing extensive damage to the marina and several neighboring boats. According to allegations made by petitioner in a related suit against the manufacturer of The Ultorian, the fire was caused by an allegedly defective washer/dryer on board the vessel. The net value of The Ultorian after the casualty was $800. Extensive damage to the marina and vessels in the vicinity of The Ultorian resulted from the fire. The claimant owners of the vessels and marina estimate damages to exceed $275,000.

II. DISCUSSION

In this court's last order dismissing petitioner's action for lack of subject matter jurisdiction, this Court exhaustively addressed and rejected petitioner's arguments that the fire which destroyed The Ultorian bore a sufficient relationship to traditional maritime activity to give rise to admiralty jurisdiction under 28 U.S.C. §1333. *See In re Sisson*, 663 F.Supp. 858 (N.D. Ill. 1987). In his motion for reconsideration, petitioner now argues that federal jurisdiction is provided by a new source: the Limitation of Liability Act, 46 U.S.C. §183. Yet, as claimants point out, motions for reconsideration serve the limited function of correcting errors of law or fact, or presenting newly discovered evidence. Motions for reconsideration cannot be used to introduce new legal theories for the first time, or to raise legal argumentation which could have been heard during the pendency of the previous motion. *Publishers Resource Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985). As nothing exists in petitioner's present motion which petitioner could not have raised previously, petitioner's motion for reconsideration must be denied.

However, even if this court were to reach petitioner's argument that the Limitation of Liability Act provides an independent basis of federal admiralty jurisdiction, this court nonetheless would be compelled to dismiss the petition. The authority cited by petitioner, *Richardson v. Harmon*, 222 U.S. 96 (1911), which held that the Limitation of Liability Act extended admiralty jurisdiction to "non-maritime" torts (torts caused by or involving a vessel on navigable waters which result in damage to property on or affixed to land) was essentially codified in 1948 by the enactment of the Extension of Admiralty Jurisdiction Act. 46 U.S.C. §740. This Act reads in relevant part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> 46 U.S.C. §740.

This subsequent congressional action made clear that admiralty jurisdiction exists irrespective of whether the tort occurs on land or water so long as other requisites for admiralty jurisdiction are present. *See Boudloche v. Conoco Oil Corp.*, 615 F.2d 687, 688 (8th Cir. 1980); *Jorsch v. LeBeau*, 449 F.Supp. 485, 487 (N.D. Ill. 1978) (holding that irrespective of the locality of the tort, a significant relation to traditional maritime activity must be shown before admiralty jurisdiction can be established). Courts interpreting the Limitation of Liability Act after the enactment of the Extension of Admiralty Jurisdiction Act have refused to find subject matter jurisdiction where other requisites for admiralty jurisdiction were not present. *See In re Howser's Petition*, 227 F.Supp. 81, 85-86 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F.Supp. 411, 413-14 (N.D.N.Y. 1960) (federal jurisdiction does not exist over petition to limit liability brought pursuant to 46 U.S.C. §183 unless traditional requirements for admiralty jurisdiction are met). *But cf. In re Colonial Trust Co.*, 124 F.Supp. 73, 75 (D. Conn. 1954) (Limitation of Liability Act provides an independent basis for admiralty jurisdiction).

After the Supreme Court's decisions in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), and *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), the law became clear that federal admiralty jurisdiction in tort cases arose only when the tort resulted from activity relating to a vessel on navigable waters and activity having a significant relationship to traditional maritime activity. These standards were applied by this court in reaching the conclusion that petitioner's action for limitation of liability must be dismissed for lack of subject matter jurisdiction. This court believes that in light of the intervening congressional action extending admiralty jurisdiction to torts occurring on land as well as the Supreme court's recent pronouncements in *Executive Jet*, and *Foremost Ins. Co.*, redefining the scope of admiralty jurisdiction in tort cases, petitioner's reliance on *Richardson v. Harmon* is misplaced and unpersuasive. As such, this court is unable to accept petitioner's assertion that irrespective of whether a significant relationship with mari-

time activity exists, the mere filing of a petition of limitation of liability under §183 provides a sufficient basis for subject matter jurisdiction.

Finally, even if this court accepted petitioner's argument that subject matter jurisdiction is provided by the Limitation of Liability Act, this court is unpersuaded that the Act applies to incidents resulting from the negligent operation or maintenance of pleasure craft used for recreational purposes. The legislative history of the Limitation of Liability Act leaves no doubt the congressional purpose behind the law was encouraging investment in the American merchant marine industry. *See* 23 Cong. Globe 331-32, 714, 31st Cong., 2d Sess. (Jan. 25, 1951). Recognizing a vast majority of other countries heavily engaged in maritime commerce maintained laws limiting or exonerating ship owners from tort liability, Congress enacted the Limitation of Liability Act to place American shipping investors on an equal footing with their foreign counterparts. *Id.* Given this clear congressional purpose, a number of courts have refused to apply the Limitation of Liability Act to pleasure craft. *See In re Lowing*, 635 F.Supp. 520 (W.D. Mich. 1986); *In re Tracey*, 608 F.Supp. 263 (D. Mass. 1985); *Baldassano v. Larsen*, 580 F.Supp. 415 (D. Minn. 1984); *Kulack v. The Pearl Jack*, 79 F.Supp. 802 (W.D. Mich. 1948) (all holding that Limitation of Liability Act does not apply to pleasure craft). *But see Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937); *In re Brown*, 536 F.Supp. 750 (N.D. Ohio 1982); *Armour v. Grandler*, 448 F.Supp. 741 (W.D. Pa. 1978); *In re Theisen*, 349 F.Supp. 737 (E.D.N.Y. 1972); *In re Klarman*, 295 F.Supp. 1021 (D. Conn. 1868) (all finding owners of pleasure craft are entitled to invoke protections of Limitation of Liability Act).

Analyzing the reasoning behind the divergent views on this issue, this court is inclined to agree with those courts refusing to extend the Limitation of Liability Act to pleasure craft. Thus, for the reasons stated in *In re Lowing*, *In re Tracey*, and *Baldassano v. Larsen*, this court would deny petitioner's petition for limitation even if subject matter jurisdiction existed to entertain this action.

III. CONCLUSION

For the foregoing reasons, petitioner's motion for reconsideration is denied.

IT IS SO ORDERED.

/s/ NICHOLAS J. BUA
Nicholas J. Bua
Judge, United States District Court

Dated: September 24, 1987

APPENDIX 5

§181. LIABILITY OF MASTERS AS CARRIERS

If any shipper of patina, gold, gold dust, silver, bullion or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or truck, shall lade the same as freight or baggage, or any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered. R.S.§4281

§182. LOSS BY FIRE

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. R.S.§4282

§183. AMOUNT OF LIABILITY; LOSS OF LIFE OR BODILY INJURY; PRIVITY IMPUTED TO OWNER; "SEAGOING VESSEL"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person or any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount of value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tor age; Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections, (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R.S. §4283; Aug. 29, 1935, c. 804, §1, 49 Stat. 960; June 5, 1936, c. 521, §1, 49 Stat. 1479.

§184. APPORTIONMENT OF COMPENSATION

Whenever any such embezzlement, loss, destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. R.S.§4284; Feb. 27, 1877, c. 69, §1,19 Stat. 251.

§185. PETITION FOR LIMITATION OF LIABILITY; DEPOSIT OF VALUE OF INTEREST IN COURT; TRANSFER OF INTEREST TO TRUSTEE

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice

of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R.S.§ 4285; June 5, 1936, c. 521, § 3,49 Stat. 1480.

§186. CHARTERER MAY BE DEEMED OWNER

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. R.S.§4286.

§187. REMEDIES RESERVED

Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy

to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. R.S. §4287.

§188. LIMITATION OF LIABILITY OF OWNERS APPLIED TO ALL VESSELS

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters. R.S.§4289; Feb. 18, 1875, c.80, §1, 18 Stat. 320; June 19, 1886, c. 421, § 4,24 Stat. 80; June 5, 1936, c.521, § 4, 49 Stat. 1481.

§189. LIMITATION OF LIABILITY OF OWNERS OF VESSELS FOR DEBTS

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. June 26, 1884, c. 121, §18, 23 Stat. 57.